(25)

No. 04-1527

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Writ Of Certiorari To The Maine Supreme Judicial Court

JOINT APPENDIX

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Certiorari Granted October 11, 2005

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Maine Board of Environmental Protection Order, Findings of Fact and Order on Appeal, October 2, 2003 [reprinted in Petition Appendix at A-35]

Cumberland County Superior Court Order, May 4, 2004 [reprinted in Petition Appendix at A-19]

Maine Supreme Judicial Court Decision, February 15, 2005 [reprinted in Petition Appendix at A-1]

RELEVANT DOCKET ENTRIES

S.D. Warren Co. v. Maine Dep't of Envtl. Prot.
Cumberland County Superior Court
Docket No. AP-3-30

11/03/03 Plaintiff's 80C Appeal filed, 10-31-03.

12/09/03 American Rivers and Friends of the Presumpscot River's motion to intervene and memorandum in support of intervention with certificate of service filed.

12/24/03 Certification of Amended Record with Attachments 279 thru 282 filed from the Department of Environmental Protection filed.

01/06/04 Petitioner, S.D. Warren Company Petitioner filed, Brief filed.

01/26/04 Order filed. (Cole, J.) JUDGMENT:

The court hereby grants intervenors American Rivers and Friends of the Presumpscot Rivers [sic] motion to intervene and memorandum in support of intervention.

02/06/04 Intervenors, American Rivers and Friends of the Presumpscot Rivers [sic], Brief with exhibit [sic] A & B filed.

02/09/04 Respondents, Maine Department of Environmental Protection and Board of Environmental Protection's brief filed.

02/23/04 Plaintiff's Reply Brief filed.

03/23/04 Respondents' motion to strike with incorporated memorandum of law with exhibits A-C filed.

03/25/04 Letter from Matthew Manahan, Esq. requesting court to review the attached U.S. Supreme Court decision made in *South Florida [Water]*

Management District vs. Miccosukee Tribe of Indians filed.

03/29/04 Petitioner S.D. Warren Company's Memorandum in Opposition to Respondents Motion to Strike filed.

04/09/04 Hearing held on 80C Appeal.

05/04/04 Order filed. (Cole, J.) JUDGMENT:

This court denies petitioner, Warren's appeal and affirms the decision of the BEP, pursuant to M.R.Civ.P. 80C.

05/26/04 Petitioner's Notice of Appeal from 5-4-04 Judgment filed.

Maine Supreme Judicial Court
Docket No. CUM-04-314

05/24/04	Petitioner's Notice of Appeal to the SJC, filed by M. Manahan
07/16/04	Brief of Petitioner and Appendix I and II, filed by M. Manahan
08/16/04	Brief of Intervenors American Rivers and Friends of the Presumpscot River, filed by S. Mahoney
08/16/04	Brief of Appellee Maine Department of Environmental Protection, filed by C. Blasi
09/02/04	Reply Brief of Petitioner, S.D. Warren Company, filed by M. Manahan
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01/07/05	Letter to Clerk, from M. Manahan Regarding FERC *City of Augusta* Order
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02/15/05	Supreme Judicial Court Opinion, affirming the judgment of the Superior Court

FINAL ENVIRONMENTAL IMPACT STATEMENT FOR HYDROPOWER LICENSES

PRESUMPSCOT RIVER PROJECTS

Dundee Project
FERC Project No. 2942-005

Gambo Project
FERC Project No. 2931-002

Little Falls Project
FERC Project No. 2941-002

Mallison Falls Project
FERC Project No. 2932-003

Saccarappa Project
FERC Project No. 2897-003

Federal Energy Regulatory Commission
Office of Energy Projects
Division of Environmental and Engineering Review
888 First Street, NE
Washington, D.C. 20246

June 2002

* * *

EXECUTIVE SUMMARY

On January 22, 1999, the S.D. Warren Company (S.D. Warren) filed applications for new licenses for five projects (herein referred to as the Presumpscot River projects) with the Federal Energy Regulatory Commission (FERC or Commission). The five projects are known as the Dundee Project (FERC No. 2942-005), Gambo Project (FERC No. 2931-002), Little Falls Project (FERC No. 2941-002), Mallison Falls Project (FERC No. 2932-003), and Saccarappa Project (FERC No. 2897-003). The five projects have installed capacities of 2,400 kilowatts (kW), 1,900

kW, 1,000 kW, 800 kW, and 1,350 kW, respectively. S.D. Warren does not propose any new capacity at any of the five projects. The project licenses expired on January 26, 2001. The existing projects are located on the Presumpscot River in Cumberland County, Maine.

In this multiple project Final Environmental Impact Statement (FEIS), we analyze and evaluate the effects associated with the issuance of new licenses for the existing hydropower projects, and recommend conditions for inclusion in any licenses issued. For any license issued, the Commission must determine that the project adopted will be best adapted to a comprehensive plan for improving or developing the waterway. In addition to the power and development purposes for which licenses are issued, the Commission must give equal consideration to energy conservation, the protection and enhancement of fish and wildlife, aesthetics, cultural resources, and the protection of recreational opportunities. This FEIS for the Presumpscot River projects reflects the staff's consideration of these factors.

Based on our consideration of all developmental and nondevelopmental resource interests related to the projects, we conclude that the following measures to protect and enhance environmental resource values should be included in any licenses issued for the Presumpscot River projects (measures apply to all five projects unless noted otherwise): (1) operate in a ROR mode; (2) continue daily headpond monitoring to facilitate better headpond control; (3) avoid impoundment drawdowns during the months of May and June and notify state fisheries personnel prior to any planned drawdowns; (4) after drawdowns, implement impoundment refill procedures as allowed by the lake level management plan (LLMP) for Sebago Lake; (5) provide

seasonally adjusted minimum flows to the bypassed reaches at Dundee, Gambo, and Mallison Falls; (6) prepare and implement a headpond elevation and minimum flow monitoring plan; (7) design and install upstream eel passage facilities; (8) implement measures (shutdowns) to protect downstream-migrant adult eels during the autumn season; (9) conduct a 3-year downstream migrating eel study to assess timing of peak eel movement, to determine the optimum time for shutdowns; (10) design and install upstream and downstream fish passage facilities for shad and river herring at each dam in a phased approach; (11) develop a fish passage implementation plan; (12) reserve the U.S. Deportment of the Interior (Interior's) authority to prescribe additional fishways; (13) maintain a buffer zone on any licensee-owned lands within the project boundary of up to 200 feet of the normal high-water level at the Dundee and Gambo project; (14) monitor and remove trees that pose hazards to boating downstream of the Gambo Project; (15) improve portage around dams; (16) improve angler and vehicular access to the bypassed reaches; (17) conduct a recreational use monitoring study in conjunction with the first Form 80 filing after construction of the proposed recreational facilities, and report monitoring results every 12 years thereafter; (18) develop and implement a revised final recreational facilities enhancement plan including resolution of the location of proposed portage and car-top boating access points, final designs for new facilities and improvements to existing facilities, and an implementation schedule; and (19) develop and implement an historic properties management plan including provisions to consult with the SHPO on non-routine maintenance, to mitigate adverse effects on historic properties, and to protect the Cumberland and Oxford Canal.

We recommend these environmental measures to protect and enhance water quality, fisheries, terrestrial, land use, aesthetics, recreational, and cultural resources. In addition, the electricity generated from the projects would be beneficial because it would continue to reduce the use of fossil-fuel, electric generating plants; conserve nonrenewable energy resources; and continue to reduce atmospheric pollution.

Section 10(j) of the Federal Power Act (FPA) requires the Commission to include license conditions based on recommendations provided by the federal and state fish and wildlife agencies. We have addressed the concerns of the federal fish and wildlife agency and made recommendations, some of which are inconsistent with those of the agency. In the DEIS, we made a preliminary determination that some of the recommendations of the U.S. Fish and Wildlife Service conflict with the public interest standard of Section 4(e) and the comprehensive planning standard of Section 10(a) of the FPA. Pursuant to Section 10(j) of the FPA, we were able to partially resolve issues of shoreline management plans and minimum flows (see section 6.3 and table 63 of this document).

Under Section 18 of the FPA, Interior filed preliminary fishway prescriptions on February 2, 2001, and filed final fishway prescriptions on February 5, 2002. Interior also requested that the Commission reserve authority for Interior to prescribe such fishways as may be necessary during the term of any license issued. The reservation includes authority to prescribe fishways for Atlantic salmon, American shad, alewife, blueback herring, and/or American eels in the event that additional prescriptions beyond those already provided are necessary in the future.

Based on our independent analysis of the projects, including our consideration of all relevant economic and environmental concerns, we conclude that the Dundee, Gambo, Little Falls, Mallison Falls, and Saccarappa projects, as proposed by S.D. Warren and with our additional staff-recommended enhancement measures, would be best adapted to a comprehensive plan for the proper use, conservation, and development of the Presumpscot River.

* * *

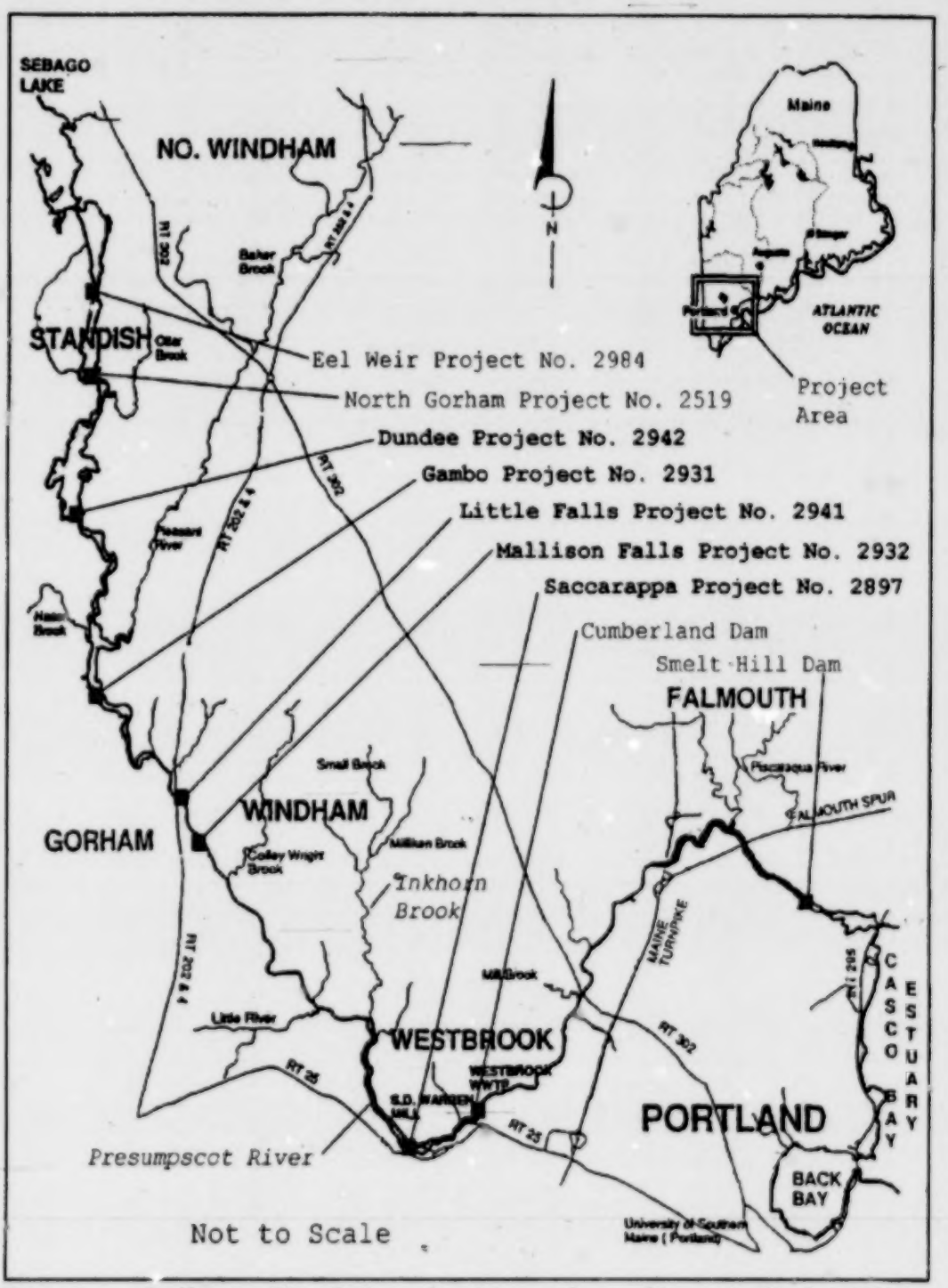

Figure 1. Presumpscot River Projects - location map (Source: License Application, 1999, as modified by staff).

* * *

2.1.1 Project Facilities and Operations

The Dundee Project consists of the following existing facilities (figure 2): (1) a 1,492-foot-long dam, consisting of a 175-foot-long, 50-foot-high earthen east embankment; a 1,050-foot-long, 50-foot-high earthen west embankment; a 90-foot-long concrete non-overflow section; a 150-foot-long, 42-foot-high concrete spillway; and a 27-foot-long, gated concrete canal intake structure; (2) a 1.7-mile-long impoundment extending from the Dundee dam upstream to the tailwaters of the North Gorham Project (FERC Project No. 2519), with a surface area of approximately 197 acres at normal headpond elevation of 187.22 feet U.S. Geological Survey (USGS) datum; (3) a 44-foot-wide by 74-foot-long reinforced concrete powerhouse which is integral to the spillway section of the dam; (4) three horizontal Francis turbines direct-connected to the generators, each with an installed capacity of 800 kW for a total project installed capacity of 2,400 kW; (5) a 1,075-foot-long bypassed reach; (6) a 1,075-foot-long, 30-foot-wide, and 11-foot-deep tailrace; (7) two 10-mile-long, 11-kilovolt (kV) transmission lines; and (8) other appurtenances.

The Gambo Project consists of the following existing facilities (figure 3): (1) a 250-foot-long, 24-foot-high concrete overflow section, a concrete sluice gate structure, and 50-foot-long canal intake structure; (2) a 3.3-mile-long impoundment extending from the Gambo dam upstream to the tailwaters of the Dundee Project, with a surface area of approximately 151 acres at normal headpond elevation of 135.13 feet USGS; (3) a 737-foot-long and 15-foot-deep concrete-lined intake canal; (4) a 47-foot-wide by 78-foot-long reinforced concrete and brick powerhouse; (5) two vertical Francis turbines direct-connected to generators, each with an installed capacity of 950 kW for a total project installed capacity of 1,900 kW; (6) a 300-foot-long bypassed reach; (7) an 8-mile-long, 11-kV transmission line; and (8) other appurtenances.

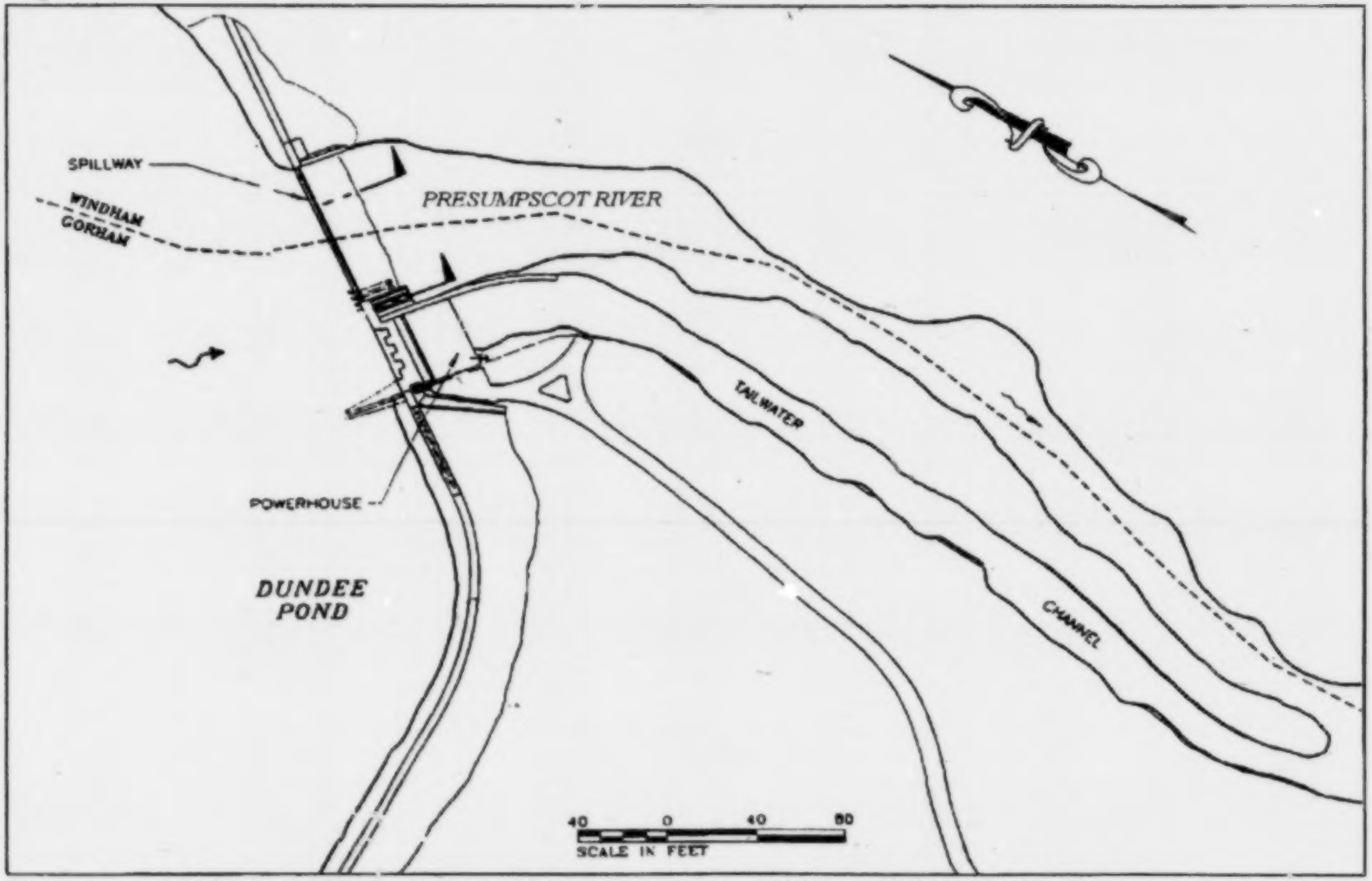

Figure 2. Dundee Project facilities (Source: License Application, 1999, as modified by staff).

The Little Falls Project consists of the following existing facilities (figure 4): (1) a 331-foot-long and 14-foot-high reinforced concrete and masonry dam incorporating a 160-foot-long spillway section, 101.5 foot-long spillway and sluice gate section, and a 70.5-foot-long intake structure; (2) a 1.7-mile-long impoundment extending from the Little Falls dam upstream to the Gambo dam, with a surface area of approximately 29 acres at normal headpond elevation of 108.7 feet USGS; (3) a 25-foot-wide by 95-foot-long masonry powerhouse which is integral to the dam; (4) four vertical Francis turbines direct-connected to generators, each with an installed capacity of 250 kW for a total project installed capacity of 1,000 kW; (5) a 300-foot-long bypassed reach; (6) an 11-kV transmission line tied into the Gambo Project transmission line; and (7) other appurtenances.

The Mallison Falls Project consists of the following existing facilities (figure 5): (1) a 358-foot-long, 14-foot-high reinforced concrete, masonry, and cut granite diversion dam consisting of a 113.5-foot-long cut granite spillway section, a 174.5-foot-long reinforced concrete spillway section, and a 70-foot-long canal headgate structure; (2) a 0.5-mile-long impoundment extending from the Mallison Falls dam upstream to the tailwaters of the Little Falls Project, with a surface area of approximately 8 acres at normal headpond elevation of 90.6 feet USGS; (3) a 675-foot-long, 41-foot-wide, and 6-foot-deep bedrock-lined intake canal; (4) a 33-foot-wide by 51-foot-long reinforced concrete and masonry powerhouse; (5) two vertical Francis turbines direct-connected to generators, each with an installed capacity of 400 kW for a total project installed capacity of 800 kW; (6) a 675-foot bypassed reach; (7) an 11-kV transmission line tied into the Gambo Project transmission line; and (8) other appurtenances.

The Saccarappa Project consists of the following existing facilities (figure 6): (1) a 322-foot-long diversion dam consisting of a 220-foot-long, 10-foot-high concrete overflow section and a 102-foot-long, 12-foot-high concrete overflow section; (2) a 5.0-mile-long impoundment extending from the Saccarappa dam upstream to the tailwaters of the Mallison Falls Project, with a surface area of approximately 87 acres at normal headpond elevation of 69.95 feet USGS; (3) two bypassed reaches measuring 475 and 390 feet long; (4) a 380-foot-long and 36-foot-wide intake canal cut into bedrock; (5) a 49-foot-wide by 71-foot-long masonry powerhouse; (6) three horizontal Francis turbines direct-connected to generators, each with an installed capacity of 450 kW for a total project installed capacity of 1,350 KW; (7) a 345-foot-long tailrace formed by a 33-foot-high guard wall; (8) a 1-mile-long, 2.3-kV transmission line/generator lead; and (9) other appurtenances.

The Presumpscot River projects operate continuously to generate electricity that is used at S.D. Warren's paper mill at Westbrook. Under typical daily operations, S.D. Warren maximizes output by manually controlling the projects in response to flow inputs from S.D. Warren's upstream Eel Weir Project (FERC No. 2984), located at the outlet of Sebago Lake, and various minor tributaries to the Presumpscot River downstream of the Eel Weir Project. The licensee operates the projects in a run-of-river (ROR) mode so that the headponds are maintained at near constant levels year round. Because the powerhouses are manually operated, daily headpond levels typically fluctuate by 0.4 foot.

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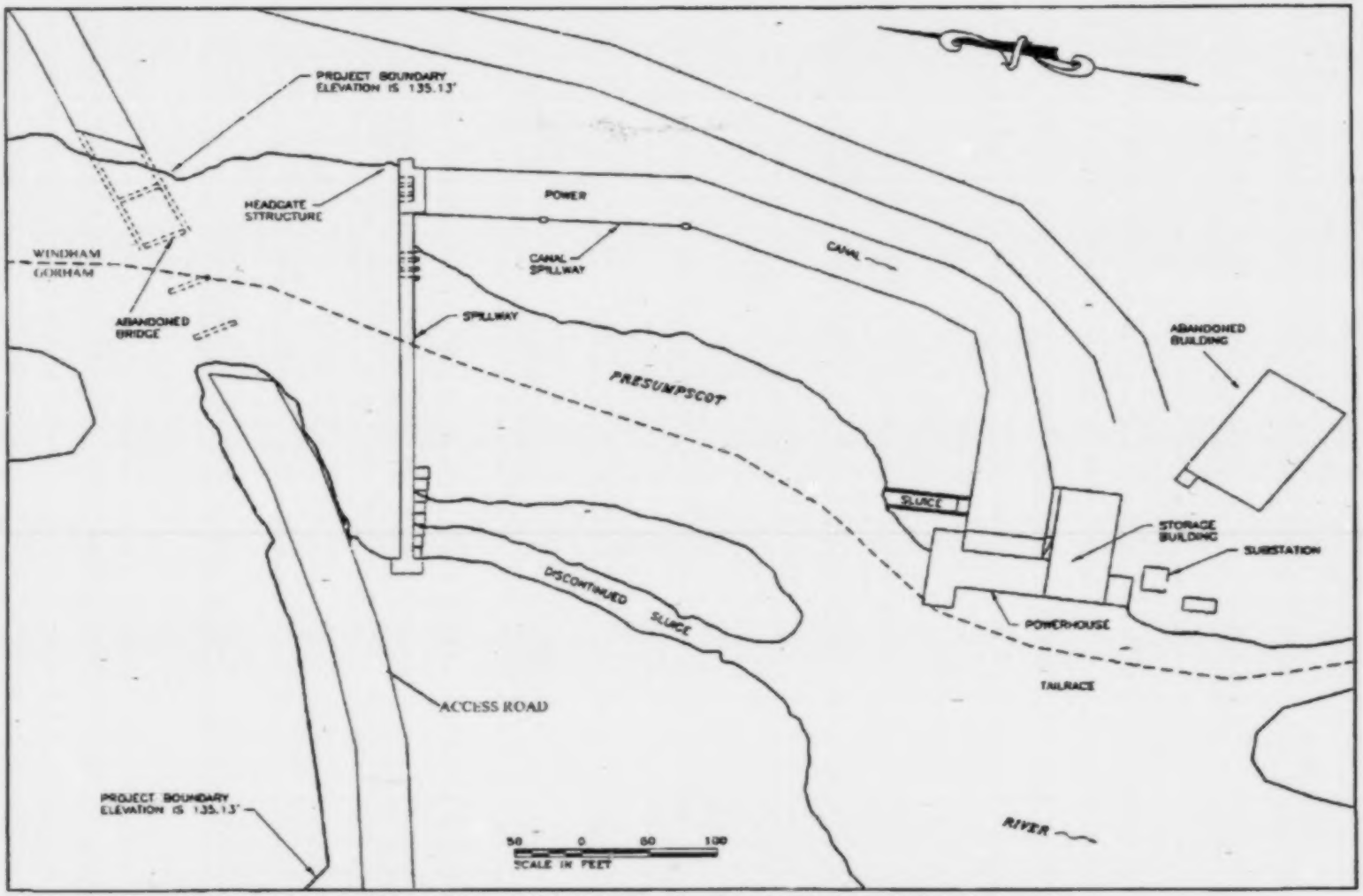

Figure 3. Gambo Project facilities (Source: License Application, 1999, as modified by staff).

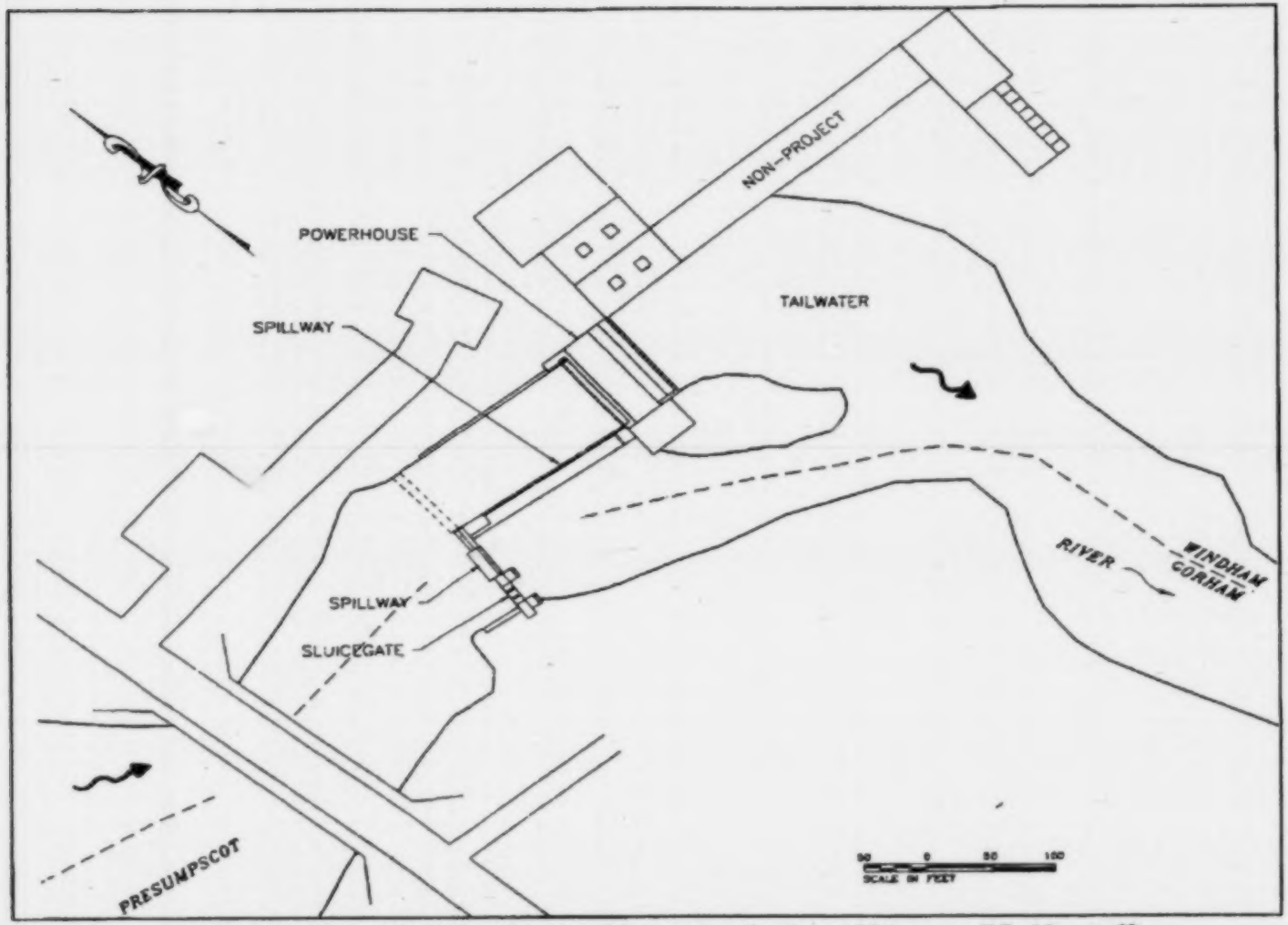

Figure 4. Little Falls Project facilities (Source: License Application, 1999, as modified by staff).

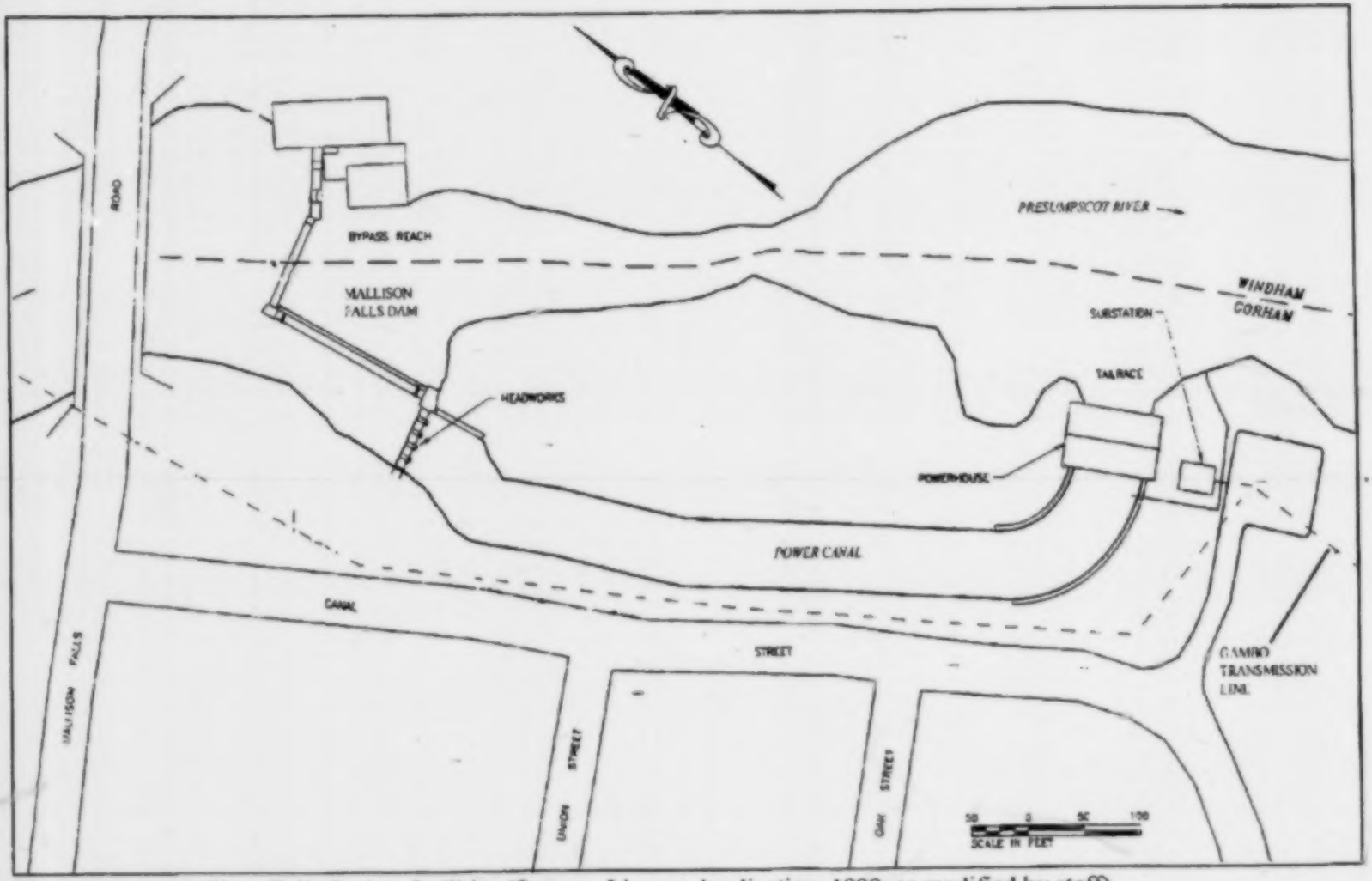

Figure 5. Mallison Falls Project facilities (Source: License Application, 1999, as modified by staff).

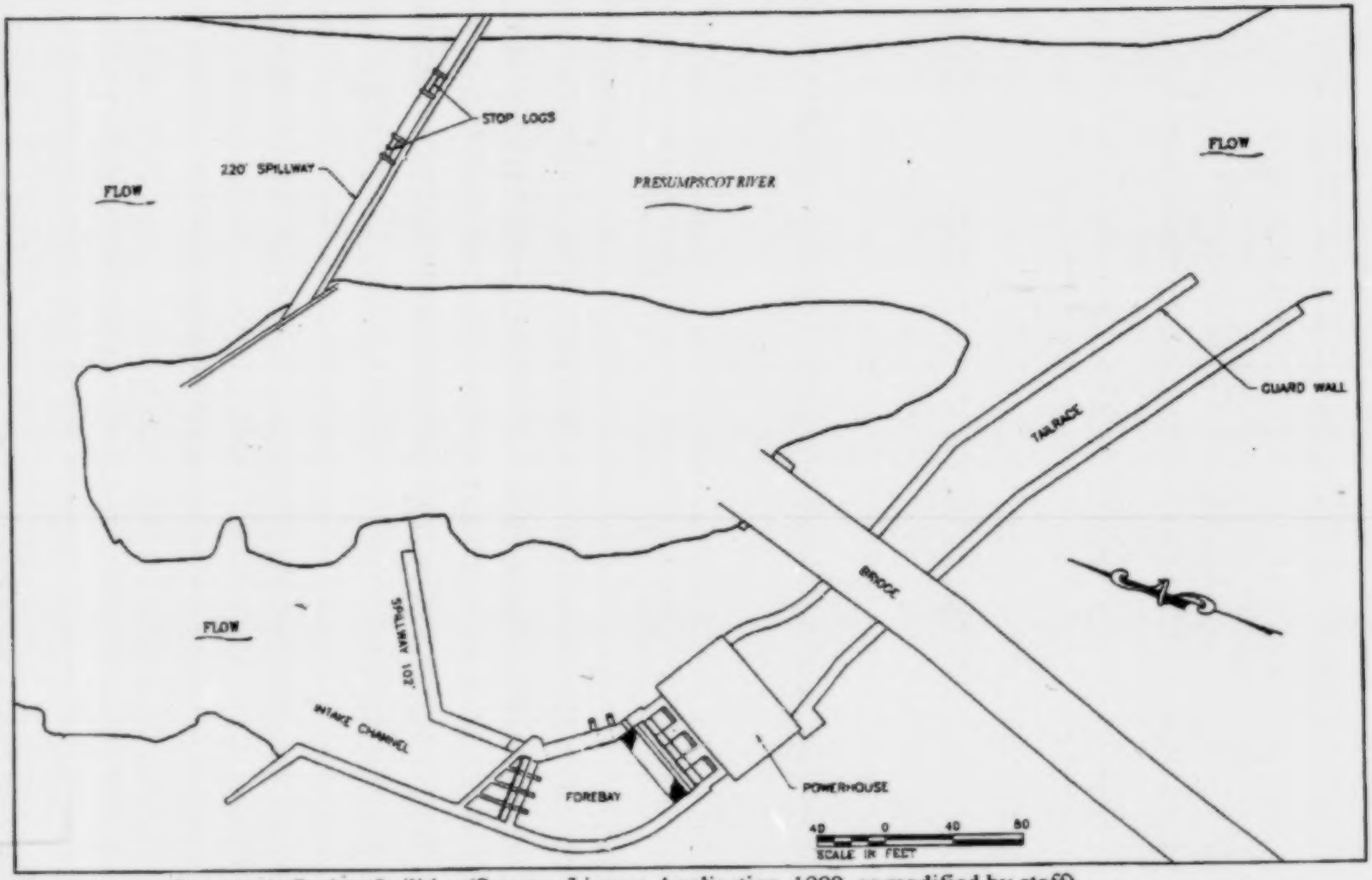

Figure 6. Saccarappa Project facilities (Source: License Application, 1999, as modified by staff).